

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 96-1285 (JR)
	)	
v.	)	
	)	
DIRK KEMPTHORNE, Secretary of	)	
the Interior, et al.,	)	
Defendants.	)	
_____	)	

**DEFENDANTS' RESPONSE TO ORDER OF THE COURT**

By Order entered January 19, 2007, the Court directed plaintiffs, defendants, and all non-party defendants to submit lists to the Court identifying all individuals as to whom Motions for Orders to Show Cause remain pending, after issuance of the Order entered January 16, 2007 (Docket 3283) denying numerous Motions for Orders to Show Cause. Defendants believe that the following Motions for Orders to Show Cause as to the individuals listed below were not fully resolved by the Order of January 16, 2007:

- A. **Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One in this Action to Appoint Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Trial One** (Docket No. 892, filed Oct. 19, 2001)

The motion sought civil and criminal contempt findings against former Secretary Norton, former Assistant Secretary McCaleb, and 37 current and former employees of the Departments of Interior and Justice. The Court bifurcated plaintiffs' contempt motion and conducted a trial solely on the issue of whether defendants Norton and McCaleb, acting in their official capacities,

had acted in civil contempt of court. The Court issued its findings of contempt on September 17, 2002. *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002) (the "September 17, 2002 Order"), and the Court of Appeals reversed on July 18, 2003. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003). In the September 17, 2002 Order, the Court referred the allegations against the 37 non-party individuals to then-Special Master Balaran. *Cobell*, 226 F. Supp. 2d at 155, 162.<sup>1</sup>

The Master established a briefing schedule that required the plaintiffs to submit Bills of Particulars ("Bills") supporting their allegations of contempt against the non-party individuals on or before May 1, 2003. Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause, November 4, 2002 at 3 (Exhibit 1). Plaintiffs submitted Bills for 15 of the 37 non-party individuals:

1. Bruce Babbitt, (Docket No. 2045).
2. John Berry, (Docket No. 2029).
3. Edith Blackwell, (Docket Nos. 1431, 2028).
4. Michael Carr, (Docket No. 2030).
5. Edward Cohen, (Docket No. 2031).
6. Kevin Gover, (Docket No. 2043).
7. Robert Lamb, (Docket No. 2038).
8. Sabrina McCarthy, (Docket No. 2044).
9. Anne Shields, (Docket No. 2047).

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<sup>1</sup>Subsequently, the Court dismissed as moot a show cause motion filed by the plaintiffs on August 27, 2001 (Docket 801), and an October 29, 2001 motion (Docket 902) by plaintiffs to supplement the October 19, 2001 Motion because it considered those issues incorporated in the October 19, 2001 Motion. *See* Order dated Sept. 17, 2002 (Docket No.1482) (disposing of Oct. 29, 2001 motion to supplement); *Cobell v. Norton*, 237 F. Supp. 2d 71, 76 note 6 (D.D.C. 2003) (treating Aug. 27, 2001 motion as subsumed by October 19, 2001 Motion).

10. Stephen Swanson, (Docket No. 2039).
11. Phillip Brooks, (Docket No. 2032).
12. Charles Findlay, (Docket No. 2033).
13. Sarah Himmelhoch, (Docket No. 2035).
14. Lois Schiffer, (Docket No. 2040).
15. David Shuey, (Docket No. 2041).

Plaintiffs did not submit Bills for the other 22 individuals:

1. M. Sharon Blackwell
2. John Bryson
3. Tom C. Clark II
4. Peter Coppelman
5. John Cruden
6. James Douglas
7. James A. Eichner
8. Timothy Elliott
9. K. Jack Haugrud
10. John Leshy
11. Hilda Manuel
12. Chester Mills
13. John S. Most
14. William G. Myers III
15. Dominic Nessi
16. Michael Rossetti

17. Kenneth F. Rossman
18. Glenn Schumaker
19. David Shilton
20. James F. Simon
21. Terence Virden
22. Daryl White

On March 8, 2005, the plaintiffs filed a Motion for Enlargement of Time to File Bills of Particulars with Respect to Various Individuals Identified in Plaintiffs' Motion for Order to Show Cause, Docket 2875. The January 16, 2007 Order denied the motion for enlargement. Defendants believe that the denial of the motion for extension disposed of the show cause motion in regard to the 22 individuals against whom Bills were not filed. However, to resolve any possible ambiguity, we respectfully suggest that the Court enter an order denying the motion to show cause as to all 37 non-party individuals. Since the Court of Appeals resolved the motion as to defendants Norton and McCaleb in both their official and personal capacities, dismissal of the motion in its entirety is appropriate.

**B. Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards, Executive Director-Office Historical Trust Accounting, Should Not Be Held in Civil and Criminal Contempt for Lying Under Oath Regarding the Nature and Scope of the Historical Accounting (Docket No. 1831, filed Feb. 26, 2003)**

The motion concerns testimony by Office of Historical Trust Accounting Director Bert Edwards in a deposition and in a sworn statement regarding the historical accounting project and Mr. Edwards' resume. The motion is also directed to former Secretary Norton and former Assistant Secretary McCaleb or his successor Aurene Martin. However, the allegations in the

motion appear directed only to Mr. Edwards. Therefore, we respectfully suggest dismissal of the motion in its entirety.

1. Bert T. Edwards
2. Gale Norton
3. Neal McCaleb
4. Aurene Martin

C. **Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Contempt for Destroying E-Mail**  
(Docket No. 1203, filed March 20, 2002)

The motion sought civil and criminal contempt sanctions concerning the overwriting of certain Department of the Interior computer backup tapes that the Special Master ruled defendants should have reviewed to determine whether they contained backup copies of Solicitor's Office emails responsive to Plaintiffs' Third Formal Request for the Production of Documents. This motion was also referred to the former Special Master. Plaintiffs filed bills of particulars concerning Secretary Norton and Assistant Secretary McCaleb in their official capacities, (Docket No. 1637). However, it was not entirely clear from the motion itself whether plaintiffs also intended to name Ms. Norton and Mr. McCaleb in their personal capacities. Plaintiffs also filed Bills of Particulars against seven non-party individuals in both their official and personal capacities:

1. Lois Schiffer, (Docket No. 1638).
2. James Simon, (Docket No. 1648).
3. Phillip Brooks, (Docket No. 1635).
4. Charles Findlay, (Docket No. 1649).
5. Edward Cohen, (Docket No. 1392).

6. Willa Perlmutter, (Docket No. 1636).

7. Edith Blackwell, (Docket No. 1399).

We respectfully suggest denial of the motion as to the non-party individuals in both their official and personal capacities, and denial as to former Secretary Norton and former Assistant Secretary McCaleb in their personal capacities.

Defendants believe that the January 16, 2007 Order resolves all other outstanding Motions for Orders to Show Cause. A draft order is enclosed.

Respectfully submitted,

PETER D. KEISLER  
Assistant Attorney General

STUART E. SCHIFFER  
Deputy Assistant Attorney General

MICHAEL F. HERTZ  
Director

/s/ Dodge Wells  
Dodge Wells  
Assistant Director  
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(202) 307-0474

Dated: January 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2007 the foregoing *Defendants' Response to Order of the Court* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
Fax (406) 338-7530

/s/ Kevin P. Kingston  
Kevin P. Kingston

LAW OFFICE


ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

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## MEMORANDUM

To: All Counsel

From: Special Master Alan L. Balaran 

Re: Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause

Date: November 4, 2002

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On September 17, 2002, the Honorable Royce C. Lamberth referred the following matters to the Special Master: (1) plaintiffs' October 19, 2001 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One and (2) plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail.<sup>1</sup> By memorandum dated October 7, 2002, the Special Master set out a proposed schedule and rules to which he invited comment. On October 30, 2002, a case management conference was convened to discuss these comments.

Upon consideration of both the written submissions of counsel and oral representations made during the case management conference, the proposed schedule set out in the October 7, 2002 memorandum is amended as follows.

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<sup>1</sup> Regarding the first matter, the Court directed the Special Master to "develop a complete record with respect to these 37 non-party individuals . . . [and] upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." Memorandum Opinion at 255 (September 17, 2002). By separate order, Judge Lamberth ordered "that the plaintiffs' motion for order to show why Interior defendants and their counsel should not be held in contempt for destroying e-mail, filed March 20, 2002, shall be referred to Special Master Balaran. Special Master Balaran shall issue a report and recommendation on the issues raised in the plaintiffs' motion." Order at 4 (September 17, 2002).



## **SCHEDULE OF PROCEEDINGS**

The Special Master will initially address those issues relevant to plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail and then turn his attention to plaintiffs' October 19, 2001 Motion for Order to Show Cause with respect to each of the 37 Named Individuals. In accordance with the position urged by the majority of counsel for the Named Individuals, the Special Master will preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery.

### **Schedule For The Investigation Regarding E-Mail Backup Tape Destruction**

- November 11, 2002: Special Master issues memorandum setting out revised schedule.
- December 2, 2002: Deadline for plaintiffs to provide Bills of Particulars with respect to the following individuals named in their Motion for Order to Show Cause Why Interior Alleged Contemnors and their Counsel Should Not be Held in Contempt for Destroying E-Mail (March 20, 2002): Secretary Gale A. Norton; Assistant Secretary Neal A. McCaleb; Department of Justice attorneys Phillip A. Brooks, Charles W. Findlay III, James Simon; former Assistant Solicitor Willa Perlmutter; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.<sup>2</sup>
- January 6, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- February 17, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- March 3, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- March - April 2003: Oral arguments on Bills of Particulars – schedule to be determined.

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<sup>2</sup> Plaintiffs have already filed Bills of Particulars with respect to Deputy Associate Solicitor Edith Blackwell and former Deputy Solicitor Edward Cohen.

- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

**Schedule for Investigation of Allegations Concerning Violation of Court Orders and Defrauding the Court in Connection with Trial One**

- May 1, 2003: Deadline for plaintiffs to file Bills of Particulars with respect to the conduct of the following individuals named in their Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One (October 19, 2001): Former Secretary of the Interior Bruce Babbitt; Former Assistant Secretary for Policy, Management and Budget John Berry; Deputy Associate Solicitor Edith Blackwell; former Deputy Commissioner for Indian Affairs M. Sharon Blackwell; former Assistant Solicitor Michael Carr; former Deputy Solicitor Edward B. Cohen; Office of the Special Trustee Chief of Staff James Douglas; Deputy Solicitor Timothy Elliott; former Assistant Secretary for Indian Affairs Kevin Gover; Deputy Assistant Secretary for Budget and Finance Bob Lamb; former Solicitor John Leshy; former Deputy Commissioner for Indian Affairs Hilda Manuel; Assistant Solicitor Sabrina McCarthy; former TAAMS Project Manager Chester Mills; Solicitor William Myers; National Park Service Chief Information Officer Dominic Nessi; Counselor to the Secretary Michael Rossetti; Office of Trust Records Director Kenneth Rossman; Management Information System specialist Glenn Schumaker; former Chief of Staff to the Secretary Anne Shields; former Assistant Solicitor Stephen Swanson; Office of Trust Responsibility Director Terrence Virden; former Department of the Interior Chief Information Officer Daryl White; Department of Justice attorneys Phillip A. Brooks; John A. Bryson; Tom C. Clark; Peter Coppelman; James A. Eichner; Charles W. Findlay III; K. Jack Haugrud; Sarah D. Himmelhoch; John S. Most; David Shilton; David F. Shuey and James Simon; Acting Assistant Attorney General John C. Cruden; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.
- June 2, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- August 4, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why the Bills of Particulars should be dismissed with respect to them.

- August 18, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.
- September - October 2003: Oral argument on Bills of Particulars – schedule to be determined.
- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

## **OTHER MATTERS**

### **I. CIVILITY**

The Special Master has a responsibility not to permit attorneys to ignore the concept of civility when its disregard may hinder the quest for a just resolution of the underlying issues.<sup>3</sup> As was noted during the October 30, 2002 case management conference, civility has been conspicuously absent during the development of this action. These proceedings will be different. Ad hominem attacks, spurious accusations and inappropriate tactics will not be tolerated. Named Individuals will be addressed either by title and name or as a "Named Individual(s)."

### **II. PRIOR FINDINGS AND REPORTS**

Findings stemming from proceedings in which the Named Individuals have not been afforded the opportunity to participate and/or comment will not be considered during these proceedings.

### **III. PROTECTIVE ORDER**

With a singular exception, counsel for plaintiffs and for the Named Individuals oppose the imposition of a protective order. The Special Master concurs and will not impose any such restrictions except to note that any information, the public disclosure of which may jeopardize the security of Interior's computer systems, will be placed under seal.

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<sup>3</sup> Civility has been defined as "[The] decent behavior and treatment characterized by generally accepted social behavior and politeness practiced toward those with whom we come into contact whether they be judge, lawyer, witness, or court personnel." Bruce S. Mencher, CIVILITY: A CASUALTY OF MODERN LITIGATION, The Washington Lawyer, Sept.- Oct. 1993, at 19, 20.

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Plaintiffs,	)	Civil Action No. 96-CV-1285 (JR)
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v.	)	
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DIRK KEMPTHORNE, Secretary of	)	
the Interior, et al.,	)	
	)	
Defendants.	)	
_____	)	

**ORDER**

Upon consideration of the responses filed by plaintiffs, defendants and non party individuals to the January 19, 2007 order issued by this Court, and upon consideration of the entire record in this case, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2007, ORDERED,

1. that Plaintiffs' Consolidated Motion to Amend Their Motion to Reopen Trial One in this Action to Appoint Receiver and Memorandum of Points and Authorities in Support Thereof and Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding this Court in Trial One (Docket No. 892, filed Oct. 19, 2001) be and hereby is DENIED; and

2. that Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Bert T. Edwards, Executive Director-Office Historical Trust Accounting, Should Not Be Held in Civil and Criminal Contempt for Lying Under Oath Regarding the Nature and Scope of the Historical Accounting (Docket No. 1831, filed Feb. 26, 2003) be and hereby is DENIED; and

3. that Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their

Counsel Should Not Be Held in Contempt for Destroying E-Mail (Docket No. 1203, filed March 20, 2002), be and hereby is DENIED as to Lois Schiffer, James Simon, Phillip Brooks, Charles Findlay, Edward Cohen, Willa Perlmutter, and Edith Blackwell in their official and personal capacities, and be and hereby is DENIED as to Gale Norton and Neal McCaleb in their personal capacities.

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Honorable James Robertson  
United States District Judge